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No. 85-279

Supreme Court, U.S.
FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT
OF THE UNITED STATES

October Term, 1985

AMERICAN PETROFINA COMPANY OF TEXAS,

Petitioner,

v.

OIL CHEMICAL & ATOMIC WORKERS
INTERNATIONAL
UNION LOCAL NO. 4-23, et al.,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER

Respectfully submitted,

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EDITOR'S NOTE

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This Supplemental Brief is filed to call the Court's attention to the similiarity of this case and the Court's

recent decision in AT&T Technologies, Inc. v. The Communication Workers of America, 54 L.W. 4339 (April 7, 1986).

In AT&T Technologies the Court reversed the courts below which had ruled that the issue of arbitrability was to be decided by the arbitrator. The Court restated the fundamental principles contained in its earlier decisions that:

1. An agreement to arbitrate a dispute must be created by the contract of the parties;

2. The issue of whether or not the parties intended for their contract to create a duty to arbitrate a particular issue must be decided by the courts - not the arbitrator; and

3. In interpreting the agreement of the parties, courts are to resolve doubts as to the parties' intentions in

favor of the arbitrability of the dispute.

In AT&T Technologies the Court made clear, again, that it would not create an obligation to arbitrate if the parties themselves had not done so, nor would it permit an arbitrator to have "free wheeling" authority to establish his own jurisdiction.

In the present case, Mr. Hildebridle was discharged for strike misconduct. All events leading to the discharge and the Company's act of discharging him occurred several months after a collective bargaining agreement expired. More than 7 months passed before a new agreement was executed and the strike ended. The trial court specifically found, in denying arbitrability of the discharge action, that the parties did not intend to arbitrate the Hildebridle discharge

(A-15). This was based on the fact that the Union sought, unsuccessfully, to obtain the Company's agreement that the discharge would be arbitrated (A-10). A back to work agreement was signed by the parties at the time the strike ended stating, as to any discharge which had previously occurred during the strike, that the parties preserved their position - the Company's being that it was not subject to the expired arbitration clause and the Union's position being that it was. This ruling of the Trial Court complied completely with the standards just restated in AT&T Technologies.

The Fifth Circuit did not review the Trial Court's findings (that Hildebridle had been effectively discharged and that the parties did not intend to arbitrate), based on the "clearly erroneous" standard of review. Rather, it ignored these

findings and created another standard, totally artificial and without precedent that no effective discharge occurred. It said that Hildebridle remained an employee - in spite of the fact that Fina intended to and did discharge him - unless and until the National Labor Relations Board "adjudicated" him otherwise. This conclusion was reached in spite of the fact that the National Labor Relations Board had specifically refused to reach the "adjudication" stage because it refused to issue an Unfair Labor Practice Complaint (A-9). Thus, the Fifth Circuit reasoned that he was automatically covered by the new contract which covered all employees not previously discharged - regardless of the terms of the "back to work" agreement of the parties.

After announcing this standard for determining arbitrability, the Court then turned the question of deciding arbitrability over to the arbitrator. It said:

> "It is up to the arbitrator, therefore, to decide in the first instance whether the grievance procedure and arbitration promise in the new contract are applicable to Hildebridle's discharge. If he decides that they are he can go on to decide on the merits the issue of the justification for the discharge." (Appendix A-5)

What standard is the arbitrator to use in determining arbitrability? The contract of the parties and the intent of the parties - as called for by AT&T Technologies - is ignored by the Fifth Circuit and obviously must be ignored by the arbitrator if he is to follow that Court's instructions. This limits him to be guided only by his own "understanding and conscience", a standard expressly rejected in AT&T Technologies.

In its Petition for Writ of Certiorari, Fina called attention to the fact that the Fifth Circuit's ruling, creating a continuing employment status until "adjudication", could lead to increased strike violence because employees who engaged in such conduct were insulated from effective discharge. The Union's response was that this would not occur because the action of discharge took effect when the employer said it did. It said:

> "Since the industrial sanction of discharge remains in effect until such time as an arbitration decision declares that the discharge action was without 'just cause,' the Company's arguments that employers possess no deterrent action to violence and irresponsible conduct are incorrect." (Respondent's Brief p. 4.)

In other words, the Union itself appears to disagree with the Fifth

Circuit's conclusion that a discharge of an economic striker cannot take effect until it is "adjudicated" to take effect. It sees the discharge action as in effect until it is set aside - if this ever occurs. This is precisely how Fina understands the law and if Hildebridle was effectively discharged when the Company took the action, then Hildebridle was not an employee when the new contract was executed. As explained in Fina's Petition, the Fifth Circuit's rule runs contrary to cases decided by this Court; is a deviation from fundamental principles of labor law; and limits the parties' ability to settle strikes where discipline has occurred.

Conclusion

The opinion of the Fifth Circuit in this case, if allowed to stand, will create confusion in the area of employer

- employee rights when strikers engage in misconduct. This area needs certainty, not uncertainty. It will also create an "exception" to the standards for determining arbitrability and will allow the Arbitrator to make this determination, the same mistake made by the Seventh Circuit, which caused this Court to reverse that Court in AT&T Technologies.

Respectfully submitted,

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